UNITED MALAYAN BANKING CORPORATION BHD

v.

PTL MARKETING SERVICES SDN BHD & ORS

HIGH COURT, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-23-3446-86]
2 FEBRUARY 2004

CIVIL PROCEDURE: *Costs - Set-off - Application to set-off time-barred judgment sum with costs awarded by superior courts - Whether application presumptuous, offensive and erroneous - Whether application to set-off should be filed in the suits where the orders of costs were made*

CIVIL PROCEDURE: *Costs - Set-off - Application to set-off time-barred judgment sum with costs - Whether application an attempt to execute the time-barred judgment*

CIVIL PROCEDURE: *Costs - Set-off - Set-off not raised during taxation of costs proceedings - Whether estoppel would prevent set-off issue from being raised subsequently*

The plaintiff obtained judgment against the second and third defendants ('the defendants') on 15 Oct 1987. Bankruptcy notices were then filed against the defendants but the notices were set aside by the High Court and the plaintiff's appeals against such decisions were, over the years, dismissed by the superior courts with costs. The 12 years' limitation for execution of the judgment dated 15 Oct 1987 expired on 15 Oct 1999. The plaintiff then applied, inter alia, to be given the right to set-off the time-barred judgment debt with the various court orders for costs which had either been taxed or were about to be taxed (prayer (iii) of the application). The facts revealed that at the taxation of costs proceedings, the plaintiff had not raised the issue of the set-off at all.

Held (dismissing prayer (iii) of application with costs):

[1] During the submissions for the taxation of costs before the High Court, the plaintiff did not raise the issue of the set-off at all. As such estoppel should be raised against the plaintiff for raising the issue of the set-off at this point of time. (p 157 b-c)

[2] The present High Court was not the correct forum to hear encl 33. If the present High Court were to allow encl 33 prayer (iii), it would be an affront to the order of costs made earlier by this court, the Court of Appeal and the Federal Court. It would amount to an abuse of the process of the court. The application to set-off should be filed in the suits where the orders of costs were made against the plaintiff. *Koay Chiew Leong v United Engineers (Malaysia) Bhd* [1999] 6 CLJ 191 (foll). (pp 159 f-h & 160 a-b)

[3] By prayer (iii), the plaintiff was actually asking the High Court to grant an order to allow the set-off of the judgment sum – although time-barred, with the costs given by the superior courts, namely the Court of Appeal and the Federal Court. From the protocol point of view, it was presumptuous, offensive and erroneous on the part of the plaintiff to file encl 33 in the present High Court. (p 160 c-e)

[4] The plaintiff could not execute the judgment against the defendants in view of s. 6(3) of the Limitation Act 1953. The plaintiff's contention that the set-off was not an 'action' and therefore not caught by the constraint of s. 6(3) of the Limitation Act 1953 could not be sustained in the face of s. 31 of the Limitation Act 1953. A 'set-off' is clearly an action within the context of the Limitation Act 1953. Whatever words the plaintiff was using could not disguise the plain fact that the plaintiff was trying to execute the time-barred judgment through the back door by couching it as a set-off. (pp 162 c-h & 163 e-f)

Case(s) referred to:

Canadian National (West Indies) Steamships Ltd [1947] AC 51 ***(refd)***
Carr v. London & North Western Rly Co. [1875] LR 10 CP 307 ***(refd)***
Cold Storage Holdings Plc & Ors v. The Overseas Assurance Corpn Ltd & Anor [1989] 2 MLJ 324, 334 ***(refd)***
Freeman v. Coke [1848] 2 Exch 654 ***(refd)***
Hopgood v. Brown [1955] 1 All ER 550 at 559 ***(refd)***
Jorden v. Mooney [1854] 5 HL Cas 185 ***(refd)***
Koay Chiew Leong v. United Engineers (Malaysia) Bhd [1999] 6 CLJ 191 ***(refd)***
Lord Hailsham in Cassell & Co. Ltd v. Broome & Anor [1972] AC ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] CLJ (Rep) 242, 246 ***(refd)***
Pickard v. Sears [1837] 6 Ad & El 469, 474 ***(refd)***
Public Textiles Berhad Lembaga Letrik Negara [1976] 2 MLJ 58 F.C ***(refd)***
Ramnani v. Personel Representatives Of The Estate Of Vaswani, Deceased (No: 2) [1994] 2 SLR 750 ***(refd)***
Re Exchange Securities & Commodities Ltd [1987] 2 All ER 272 ***(refd)***
Smith v. Blandford Gee Cementation Co Ltd [1970] 3 ALL ER 154 ***(refd)***
V. Veeriah v. General Manager, Keretapi Tanah Melayu [1974] 1 MLJ 201, 201-202 ***(refd)***
Sweney v. The Department of Highways [1933] O.W.N. 783 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 115
Limitation Act 1953, ss. 6(3), 31
Rules of the High Court 1980, O. 14 r. 1

For the plaintiff - R Yogeswari Rathakrishnan; M/s Che Mokhtar & Ling
For the 2nd defendant - Liow Si Khoon; M/s Liow & Co
For the 3rd defendant - Aimee SH Liew M/s YH Teh & Quek

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Enclosure 33
By way of enclosure 33, the plaintiff sought the following prayers:

(i) That a stay of taxation hearing be granted in respect of the Bill of Costs and the Notice of Taxation in the Federal Court under Civil Appeal No: 03-2-2001 (W) and in the Court of Appeal under Civil Appeal No: 03-50-1996 until the application is heard and disposed off.

(ii) That a stay of execution be granted for all the costs taxed and granted under Bankruptcy No: D2-29-1652-92, Bankruptcy No: D2-29-3642-93 and Bankruptcy No: D3-29-218-96 until this application is heard and disposed off.

(iii) A declaration that the plaintiff is entitled to set-off the costs taxed or that will be taxed under Bankruptcy No: D2-29-1652-93, Bankruptcy No: D5-29-220-96, Bankruptcy No: D2-29-364-93 and Bankruptcy No: D3-29-218-96 at the High Court, Court of Appeal and Federal Court against the Judgment dated 15 October 1987.

(iv) That the costs of this application be costs in the cause.

(v) Any other relief which is deemed reasonable and fair by this Honourable Court.

At the outset, the plaintiff withdrew prayers (i) and (ii) of enclosure 33 as the plaintiff intended to apply for those prayers at the relevant and appropriate Bankruptcy Courts. I forthwith struck out prayers (i) and (ii) of enclosure 33 with costs. This judgment centred on prayer (iii) of enclosure 33.

Chronology of events in respect of the second defendant – the husband

15.10.1987 Judgment obtained against the defendants. It must be noted that the 12 years' limitation on execution expired on 15 October 1999 – see s. 6 (3) of the Limitation Act, 1953.

16.03.1992 First Bankruptcy Notice filed against the second defendant.

3.04.1992 The second defendant filed an application to set aside the first Bankruptcy Notice.

26.02.1994 The senior assistant registrar granted an order in terms for the first Bankruptcy Notice. On the same day, the second defendant filed the notice of appeal to the Judge in Chambers.

25.4.1994 The first Bankruptcy Notice dated 16.3.1992 was set aside by the Judge in Chambers.

24.1.1996 The plaintiff filed a fresh Bankruptcy Notice against the second defendant and that interest calculated from 1.4.1986 to 24.1.1996 (date of Bankruptcy Notice). It must be noted that interest was not calculated from 14.10.1993.

1.4.1996 The second defendant filed an application to strike out the second Bankruptcy Notice on the ground that the interest calculated exceeded the permissible time frame.

26.4.1996 The senior assistant registrar disallowed the second defendant's application.

25.6.1996 The second defendant's appeal to the Judge in Chambers was allowed with costs vide D5-29-220-1996 at the Kuala Lumpur High Court.

22.7.1996 The plaintiff appealed to the Court of Appeal.

15.10.1999 The 12 years' limitation for execution of the Judgment dated 15.10.1999 sets in – see s. 6 (3) of the Limitation Act, 1953.

10.2.2001 The plaintiff's appeal to the Court of Appeal was dismissed with costs.

5.4.2001 The plaintiff's appeal to the Federal Court was also dismissed with costs.

Chronology of events in respect of the third defendant – the wife

15.10.1987 Summary judgment entered pursuant to Order 14 rule 1 of the Rules of the High Court 1980 ("RHC").

26.10.1993 Bankruptcy Notice No: D2-29-3642-93 was issued. This was 6 years after the Judgment was entered.

10.9.1994 Bankruptcy Notice No: D2-29-3642-93 was set aside. No appeal was filed to the Judge in Chambers from the senior assistant registrar's decision in setting aside that Bankruptcy Notice.

24.1.1996 Bankruptcy Notice No: D3-29-218-96 was issued. It was issued 8 years 10 months after the Judgment was entered and one (1) year 4 months from the date the Bankruptcy Notice No: D2-29-3642-93 was set aside.

24.7.1996 There was an application to strike out the Bankruptcy Notice No: D3-29-218-96 but it was dismissed by the senior assistant registrar.

25.10.1996 Notice of appeal against the decision of the senior assistant registrar to the Judge in Chambers and the learned Judge dismissed the appeal.

22.11.1996 Notice of appeal filed to the Court of Appeal against the Judge's decision of 25.10.1996. No date fixed for hearing of the Notice of appeal to the Court of Appeal.

11.8.1998 Adjudication and Receiving Orders made.

19.8.1998 Summons in chambers filed to rescind and annul the Adjudication and Receiving Orders.

11.11.1998 The senior assistant registrar dismissed the application to rescind and annul the Adjudication and Receiving Orders.

13.11.1998 Notice of appeal filed against the senior assistant registrar's decision of 11.11.1998.

14.4.2003 Notice of appeal allowed with costs with the result that the Adjudication and Receiving Orders were rescinded and annulled.

Analysis

This was the plaintiff's application seeking a pure declaratory relief that they be given the right to set-off the time barred debt due pursuant to a very old Judgment dated 15.10.1987 with the various Court costs which had been or about to be taxed.

It must be borne in mind that recently the second defendant was awarded costs amounting to RM9,920.00 at the Kuala Lumpur High Court vide Bankruptcy Notice No: D2-29-1652-92 and Bankruptcy Notice No: D5-29-220-96. The costs was awarded to the second defendant for successfully setting aside the first Bankruptcy Notice and the second Bankruptcy Notice at the High Court level. The sum of RM9,920 had been fully paid by the plaintiff.

It must also be borne in mind that during the submission for the taxation of costs before the relevant High Courts, the plaintiff did not raise the issue of set-off at all. As such, estoppel should be raised against the plaintiff for raising the issue of set-off at this point of time (see s. 115 of the Evidence Act, 1950). *I would be forgiven if I were to reproduce s. 115 of the Evidence Act, 1950 in verbatim and I shall do so now:*

> **115 Estoppel**
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.
>
> **ILLUSTRATION**
>
> **A** intentionally and falsely leads B to believe that certain land belongs to **A** and thereby induces **B** to buy and pay for it.
>
> The land afterwards becomes the property of **A** and **A** seeks to set aside the sale on the ground that at the time of the sale he had no title.
>
> He may not be allowed to prove his want of title.

It is clear that this section deals with estoppel by conduct. In Pickard v. Sears (1837) 6 Ad & El 469, 474 a good exposition of the doctrine of estoppel by conduct was stated by the court there and it was favourably referred to by Raja Azlan FJ (as His Highness then was) in *Public Textiles Berhad Lembaga Letrik Negara* (1976) 2 MLJ 58 F.C., at p. 60 to the following effect:

> That, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

In *V. Veeriah v. General Manager, Keretapi Tanah Melayu* (1974) 1 MLJ 201, 201-202, Mohamed Azmi J. (as he then was) aptly said:

> Sarkar on Evidence, Twelfth Edition, at p. 1033 states that there are seven prerequisites to bring a case within the scope of estoppel as defined in section 115. It was contended by the defence that all these prerequisites had been fulfilled, namely:
>
> (1) There must be a representation by a person or his authorised agent to another in any form – a declaration, act or omission.
>
> (2) The representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract.
>
> (3) The representation must have meant to be relied upon, i.e. it must have been made under the circumstances which amounted to an intention causing or permitting belief in another. The proof of the intent might be direct or circumstantial, e.g. by conduct.
>
> (4) There must have been belief on the part of the other party in its truth.
>
> (5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment.
>
> (6) The misrepresentation or conduct or negligence must have been the proximate cause of leading the other party to act to his prejudice.
>
> (7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of things or had means of knowledge, there can be no estoppel.

Of course the representation must be clear and unequivocal (Cold Storage Holdings Plc and Ors v. The Overseas Assurance Corpn Ltd and Anor (1989) 2 MLJ 324, 334). So it can be surmised that where a person, by his words or conduct, has made a representation of fact with the intention, whether actual or presumed, of inducing another on the faith of that representation to alter his position to his detriment and as a result that other person has been led so as to alter his position, the first person (*Re Exchange Securities and Commodities Ltd* (1987) 2 All ER 272) is subsequently estopped from denying, as against the other person, that the facts were as represented by him (*Hopgood v. Brown* (1955) 1 All ER 550 at 559; Carr v. London & North Western Rly Co. (1875) LR 10 CP 307; and *Smith v. Blandford Gee Cementation Co Ltd* (1970) 3 All ER 154). However, it must be pointed out that the doctrine of

estoppel by representation must be confined to representations of existing fact or past fact *(Jorden v. Money* (1854) 5 HL Cas 185) and it must also be unambiguous (*Freeman v. Cooke* (1848) 2 Exch 654; and *Canadian & Dominion Sugar Co Ltd v. Canadian National (West Indies) Steamships Ltd* (1947) AC 46). Of pertinence would be the case of *Greenwood v. Martins Bank Ltd* (1933) AC 51. There the plaintiff brought an action against the bank for amounts paid out of his account on cheques forged by his wife. The plaintiff discovered and knew about the forgeries but he did not disclose them to the bank. The House of Lords held that he was estopped from alleging the forgery because as a customer of the bank who owed a duty to disclose his knowledge, his deliberate abstention from speaking amounted to a representation to the bank that the forged cheques were in fact in order. That, in my view, would be a classic example of estoppel by silence or inaction.

Another disturbing feature in this case was this. The plaintiff saw it fit to insert two copies of the letters dated 18.11.2003 and 24.11.2003 in their bundle of authorities at pp. 95 and 96 but these two letters were not part of the exhibits annexed to any affidavits involved in adjudicating enclosure 33 and I must accordingly hold and it was part and parcel of my judgment that it was tantamount to giving evidence at the bar.

Be that as it may, the second defendant has filed a notice of taxation at the Federal Court and the hearing has now been fixed on 20.2.2004. It was in the month of June 2003 that the plaintiff raised the issue of set-off for the very first time and the plaintiff then proceeded to apply for a mere declaratory relief in the High Court on matters that relate to the Court of Appeal and the Federal Court. In my judgment, I cannot entertain prayer (iii) of enclosure 33.

The learned counsel for the third defendant in the person of Miss Aimee S.H. Liew vigorously submitted that this court was not the correct forum to hear enclosure 33. She further pointed out that if I were to allow enclosure 33 prayer (iii) thereof it would be an affront to the order of costs made by the other High Courts, Court of Appeal and the Federal Court. It would tantamount to an abuse of the process of the court. It would set a very dangerous precedent. I subscribed fully to the views expressed by Miss Aimee S.H. Liew.

Order 18 r. 17 of the RHC governs set-off and it states as follows:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

And on the authority of *Koay Chiew Leong v. United Engineers* (Malaysia) Bhd (1999) 6 CLJ 191, I must hold that the application to set-off must be filed in the suits where the orders of costs were made against the plaintiff. In *Koay Chiew Leong's case* the set-off and the counterclaim of the defendant was filed in the same suit.

Reverting back to the issue of the wrong forum, I have this to say. The plaintiff had brought this action in the wrong court. The proper forum to seek the declaration as per prayer (iii) of enclosure 33 should be in the original courts that granted the order for costs, namely, the Court of Appeal and the Federal Court. What the plaintiff was doing in relation to prayer (iii) of enclosure 33 was this. It was actually asking the High Court to grant an order to allow the set-off of the Judgment sum – albeit time barred, with the costs which was clearly given by the superior courts, namely, the Court of Appeal and the Federal Court. From the protocol point of view, it was presumptuous, offensive and erroneous on the part of the plaintiff to file enclosure 33 in this court. *Lord Hailsham in Cassell & Co. Ltd v. Broome & Anor* (1972) AC 1027 at page 1054 D-E aptly said:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchal system of courts which exist in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd* (1944) 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

Put differently it meant this. That it was necessary that each lower tier including the High Court, to accept loyally the decisions of the higher tiers. That would precisely be the doctrine of stare decisis.

Professor Gerald L. Gall writing a text known as "The Canadian Legal System" 2nd edition (Toronto: Carswell Legal Publications, 1983) at page 220 described the doctrine of precedent or stare decisis in this way:

> The operation of the doctrine of stare decisis is best explained by reference to the English translation of the Latin phrase. `Stare decisis' literally translates as `to stand by decided matters'. The phrase `stare decisis' is itself an abbreviation of the Latin phrase 'stare decisis et non quieta movere' which translates as `to stand by decisions and not to disturb settled matters'.
>
> Basically, under the doctrine of stare decisis, the decision of a higher court within the same provincial jurisdiction acts as binding authority on a lower court within that same jurisdiction.

In the case of *Sweney v. The Department of Highways* (1933) O.W.N. 783 (C.A.), Middleton J.A. who spoke for the Ontario Court of Appeal categorically stated at pp. 783-784:

> But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view that Judge would take on a consideration of the matter, without any regard to previous decisions.

Decisions of eminent judges from the Superior Courts must certainly be accepted and applied. They are binding. Basically, consistency and predictability in law play a central part in our judicial system.

When enclosure 33 came up for hearing for the very first time on 13.8.2003, I had actually expressed my uneasiness and concern over the protocol issue and I had admonished the plaintiff's counsel and even went to the extent of advising the plaintiff's counsel to advise her client accordingly in regard to enclosure 33. Consequently, I gave a mention date and that was on 14.10.2003. Sometime later and this was on 20.11.2003 when the matter came up before me, the learned counsel for the plaintiff orally applied for an interim stay of proceedings pending the final adjudication of the declaratory application. I refused to accede to the request of the plaintiff's counsel. I expressed my concern that the plaintiff's counsel's request was tantamount to directing the Superior Courts on matters properly within their own jurisdiction. The Judgment dated 15.10.1987 was a good judgment and the High Court that handed down that judgment was already functus officio. By way of prayer (iii) of enclosure 33, the plaintiff was attempting to go by the back door which the plaintiff could not, in the first place, obtain via the front door. Assuming for a moment that I allow prayer (iii) of enclosure 33, this means that the plaintiff would then physically bring my order to the Court of Appeal and the Federal Court respectively during the taxation of cost proceedings and inform these respective courts that my order is binding on them. With respect, the scenario I have just alluded to would certainly go against the doctrine of stare decisis. It is nothing more than a reckless disregard of the hierarchy system within the judiciary.

Was the plaintiff entitled to set-off the Judgment against the costs? This would be the nagging question to pose. I would for the reasons that will now follow answer this question in the negative.

It is note worthy to remember that the Judgment for which the plaintiff was intending to set-off the costs was obtained way back on 15.10.1987. *Section 6 (3) of the Limitation Act, 1953 enacts as follows:*

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

This meant that the plaintiff's application was clearly time barred. The last date to execute that Judgment would be on 14.10.1999. In my judgment, the plaintiff would be unable to execute that Judgment against the second and the third defendants. Taken in that context, the plaintiff cannot now say that they are still entitled to the principal sum plus interest which are now time barred. In attempting to distinguish between the defence of set-off with the word **"action"**, the plaintiff was merely buying time. It was nothing more than a ploy. A play of words. The net effect would still be the same. That the plaintiff was attempting to enforce a Judgment which was already time barred.

Section 31 of the Limitation Act, 1953 has this to say:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Indeed it is interesting to note that the Limitation Act, 1953 specially deals with set-off and counterclaim in the context of limitation. The plaintiff contended that the proposed **"set-off"** was not an **"action"** and therefore it was not caught by the constraint of s. 6 (3) of the Limitation Act, 1953. Incidentally, in *Guannex Leasing Sdn Bhd v. Sin Fatt Brothers Construction & Ors* (2002) 6 CLJ 433 taxation of a bill of costs was said to be an "action" as defined in s. 2 of the Limitation Act, 1953. But, fortunately, the plain words in s. 31 of the Limitation Act, 1953 has removed any uncertainty. Two things are clear from s. 31 of the Limitation Act, 1953, namely:

(a) Any claim by way of a set-off shall be deemed to be a separate action; and

(b) The deemed action (of the set-off) shall be deemed to have been commenced on the same date as the action in which the set-off is pleaded.

So, the argument that the **"set-off"** was not an **"action"** cannot be sustained in the face of the clear and plain wordings of s. 31 of the Limitation Act, 1953. And given that the **"set-off"** was an action within the context of the Limitation Act, 1953, this would then attract the operation of s. 6 (3) of the same Act which clearly prohibited the plaintiff from claiming the set-off because it was clearly out of time. In *Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* (1985) CLJ (Rep) 242, 246, Salleh Abas L.P. defined **"set-off"** in this way:

> A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued.

However, this definition was not made in the context of the Limitation Act, 1953. I would, with respect, revert back to s. 31 of the Limitation Act, 1953 because it specifically deals with the subject of set-off and a further reading of that section clearly shows that the time to commence the action for set-off is the time when the taxation of the Bill of Costs takes place because that is where the set-off would rightfully be pleaded.

Whatever words the plaintiff was using cannot disguise the plain fact that what the plaintiff was doing was to execute the Judgment through the back door by couching it as a **"set-off"**. The claim for **"set-off"** as claimed by the plaintiff should not be allowed. To allow it would be tantamount to an enforcement of a Judgment which was already time barred (*Ramnani v. Personal Representatives Of The Estate Of Vaswani, Deceased* (No: 2) (1994) 2 SLR 750). In my judgment, the plaintiff was still regurgitating a stale Judgment.

Conclusion

For all these reasons, I dismissed prayer (iii) of enclosure 33 with costs. I too ordered the closure of the file.